PERWIRA AFFIN BANK BHD

v.

AHMAD ABDUL RAHMAN

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: D2-22-307-1997]
8 JANUARY 1999

CIVIL PROCEDURE: *Striking out - Statement of claim - Application on ground that no reasonable cause of action disclosed - Application based on defence of limitation - Whether application to strike out on ground that statement of claim does not disclose reasonable cause of action may be based on defence of limitation - Rules of the High Court 1980, O. 18 rr. 19(1)(a) & 19(2)*

CIVIL PROCEDURE: *Pleadings - Striking out statement of claim - Application on ground that no reasonable cause of action disclosed - Application based on defence of limitation - Whether application to strike out on ground that statement of claim does not disclose reasonable cause of action may be based on defence of limitation - Rules of the High Court 1980, O. 18 rr. 19(1)(a) & 19(2)*

The defendant applied to strike out the plaintiff's statement of claim under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 ('the RHC'), that is, on the ground that the statement of claim disclosed no reasonable cause of action. The basis of this application by the defendant was that the plaintiff's action had been barred by limitation. The Senior Assistant Registrar dismissed the defendant's application and this was the consequential appeal.

Held:

[1] As the ground of this application is that the statement of claim did not disclose a reasonable cause of action, O. 18 r. 19(2) of the RHC prohibited the admission of evidence. One has to look only at the statement of claim to determine whether it disclosed no reasonable cause of action.

[2] Where it appears from a statement of claim that a plaintiff's action has been barred by limitation, it is **not** possible for the defendant to have the statement of claim struck out on the ground that it discloses no reasonable cause of action because the plaintiff may still be able to show that he is entitled to bring his action by reason of any exception to the defence of limitation.

[3] Where it is thought to be clear that limitation is a defence, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence.

[Appeal dismissed.]

Cases referred to:
Alias Ismail v. Hairuddin Mohamad [1997] 4 CLJ 669 ***(dist)***
Dismore v. Milton [1938] 3 All ER 762 ***(foll)***
Hj Hussin Hj Ali v. Datuk Hj Mohamed Yaacob [1983] 2 MLJ 227 ***(dist)***
Riches v. Director of Public Prosecutions [1973] 2 All ER 935 ***(dist)***
Ronex Properties Ltd v. John Laing Construction Ltd [1983] 1 QB 398 ***(foll)***
Tio Chee Hing & Ors v. Government of Sabah [1981] 1 MLJ 207 ***(dist)***

Legislation referred to:
Limitation Act 1953, s. 6
Public Authorities Protection Act 1948, s. 2
Rules of the High Court 1980, O. 18 r. 19(1)(a), (2)

For the plaintiff - Lee Teng Joo; M/s Shook Lin & Bok
For the defendant - C Sivashanker; M/s Cheah Teh & Su

Reported by S Dharmendran

JUDGMENT

Abdul Aziz Mohamad J:

The learned senior assistant registrar dismissed the defendant's application under O. 18 r. 19(1)(a) for the striking out of the statement of claim in this action, and for the dismissal of this action, on the ground that the statement of claim disclosed no reasonable cause of action. The defendant now appeals.

The claim of the plaintiffs is for the payment of a sum allegedly due on an overdraft facility. Learned counsel for the defendant argued this appeal on the basis that the cause of action accrued on 16 October 1987, when, as stated in para. 12 of the statement of claim; the plaintiffs made a demand for payment.

According to paras. 14 and 15 of the statement of claim, the plaintiffs had, in an earlier suit, Kuala Lumpur High Court Suit No. D4-23-429-88, filed on 19 February 1988, instituted action to recover the debt but, on 16 July 1993, by consent of both parties, the action was struck out with liberty to file afresh. The statement of claim does not state the circumstances that had given rise to the striking out.

On 15 October 1993 the six-year period – as provided in s. 6 of the Limitation Act 1953 – from 16 October 1987, the date on which the cause of action accrued, expired.

The present action was only brought on 24 April 1997.

In para. 9 of his statement of defence, filed on 10 April 1998, the defendant claims that, notwithstanding that on 16 July 1993 liberty to file afresh was given, the plaintiffs' action has been barred by limitation. The defendant followed up the filing of his statement of defence with the filing of his striking-out application on 13 April 1998, which the senior assistant registrar dismissed. The ground of the application being that the statement of claim does not disclose a reasonable cause of action, by O. 18 r. 19(2) no affidavit is admissible, and none has been used, for the purposes of the application. One has to look only at the statement of claim to determine whether it discloses no reasonable cause of action.

In *Dismore v. Milton* [1938] 3 All ER 762 the English Court of Appeal held, as stated in the headnote, that "where it appears from a statement of claim that the plaintiff's cause of action arose at a time before the period prescribed by the Statute of Limitations it is not possible for the defendant to have the statement of claim struck out on the ground that it discloses no reasonable cause of action ..." The reason is given at p. 763 as follows:

> It is because the plaintiff may be able to show that he is entitled to bring his action, notwithstanding the expiration of the statutory period, by reason of one of the exceptions contained in the Limitation Act ...

So according to *Dismore v. Milton,* it is not possible for the defendant here to have the statement of claim struck out on the ground that it discloses no reasonable cause of action.

Learned counsel for the defendant relied on *Riches v. Director of Public Prosecutions* [1973] 2 All ER 935, another decision of the English Court of Appeal, where, at p. 938h, Davies LJ thought that the dicta in *Dismore v. Milton* were somewhat too wide, and where the Court of Appeal held that the statement of claim should be struck out, one of the reasons being, as stated in the headnote, that:

> (ii) it was open to the court to strike out a statement of claim as disclosing no reasonable cause of action where the facts alleged fell outside the limitation period, although in certain circumstances a plaintiff might be held to have a reasonable cause of action, for example where it could be shown that there might be an escape from the Statute of Limitations; where, however, it was clear that the defendant was going to rely on the statute and there was nothing before the court to suggest that the plaintiff could escape from it, the claim would be struck out.

It must be appreciated, however, that in that case the application to strike out was not only on the ground that the statement of claim disclosed no reasonable cause of action but also on the ground that it was vexatious and an abuse of the process of the court. Evidence was therefore admissible for the court to consider.

Dismore v. Milton was subsequently applied by the English Court of Appeal in *Ronex Properties Ltd v. John Laing Construction Ltd* [1983] 1 QB 398. In that case, an architect who was sued for negligence served a third-party notice on the consulting engineers ("Clarkes") claiming indemnity or contribution on the grounds of breach of contract and negligence. I shall disregard the fact as irrelevant for present purposes that the architect subsequently died and that personal representatives took over his place in the action. Before the third-party statement of claim was delivered, Clarkes applied to have the third-party notice struck out on the ground only that it disclosed no reasonable cause of action, one of the reasons being that the alleged causes of action in contract and tort were barred by limitation. The third-party statement of claim not having been delivered, no third-party statement of defence had been delivered to raise limitation as a defence, and of course it was not known what exception to limitation the architect would raise in his reply. The judge dismissed Clarkes' application and the Court of Appeal dismissed their appeal.

The leading judgment was that of Donaldson LJ. The essential part of his judgment is to be found at p. 404. He said:

> Authority apart, I would have thought that it was absurd to contend that a writ or third party notice could be struck out as disclosing no cause of action, merely because the defendant may have a defence under the Limitation Acts ... [It] is trite law that the English Limitation Acts bar the remedy and not the right; and, furthermore, that they do not have this effect unless and until pleaded. Even when pleaded they are subject to various exceptions, such as acknowledgment of a debt or concealed fraud, which can be raised by way of reply.

He then alluded to the fact that the attitude of the architect towards a defence of limitation could only emerge when he came to deliver his reply, and continued:

> Accordingly, authority apart, I would have unhesitatingly dismissed the application to strike out upon this ground. The answer might well have been different if Clarkes had relied upon any ground other than failure to disclose a reasonable cause of action, but in that event all concerned could have adduced evidence and we would have been able to explore the factual basis upon which it is said that the Limitation Acts do, or as the case may be do not, apply.

> The matter is not in fact free from authority. It was considered in *Riches v. Director of Public Prosecutions* [1973] 1 WLR 1019, in which the earlier cases are reviewed. There the grounds put forward in support of the application to strike out included an allegation that the claim was frivolous and vexatious and an abuse of the process of the court. Accordingly, the court was able to consider evidence and it is understandable that the claim could be struck out. Of the cases referred to, it seems that only in *Dismore v. Milton* [1938] 3 All ER 762, was an attempt made to strike out solely upon the ground that the Limitation Acts applied and accordingly no cause of action was disclosed. Greer LJ and Slesser LJ held that such an application must fail for the reasons which I have already indicated and contrasted the effect of the Statute of Limitations with that of the Real Property Limitations Acts. That being a two-judge court, we are not strictly bound by its decision, but I have no doubt that it was right. Where it is thought to be clear that there is a defence under the Limitation Acts, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence. But in no circumstances can he seek to strike out on the ground that no cause of action is disclosed.

I would follow the decision in *Ronex* and rule that the defendant cannot seek to strike out this action on the ground that no cause of action is disclosed.

Two decisions of the Federal Court were cited by learned counsel for the defendant where the Federal Court dismissed appeals from the striking out of statements of claim on the ground of debarment by limitation. They are *Tio Chee Hing & Ors v. Government of Sabah* [1981] 1 MLJ 207 and *Haji Hussin bin Haji Ali v. Datuk Haji Mohamed bin Yaacob* [1983] 2 MLJ 227. Those, however, were cases, unlike the present case, where the grounds for striking out were not only that the statement of claim disclosed no reasonable cause of action but also that it was vexatious and an abuse of the process of the court and where, therefore, evidence by affidavit was admissible.

Learned counsel for the defendant also cited *Alias bin Ismail v. Hairuddin bin Mohamad* [1997] 4 CLJ 669; [1997] 3 MLJ 724, a decision of the Court of Appeal. It was an appeal from a striking out of a statement of claim on the ground, as stated by Abdul Malek Ahmad JCA, that it did not disclose a reasonable cause of action by reason of limitation under s. 2 of the Public Authorities Protection Act 1948. The appeal was dismissed. That was a hopeless case because even though, assuming that the ground for striking out was only that of non-disclosure of a reasonable cause of action, no evidence was allowed, in the court below the appellant

had asked to be exempted from the limitation provision on the ground that, being a public servant, he could not sue the government without the approval of his head of department and, presumably, getting the approval had delayed the institution of the action. He had no other possible exception to limitation to claim. The Court of Appeal considered that they should not compute the limitation period from the date when the appellant obtained approval – thus indicating that they were of the view that the matter raised did not provide an exception to limitation – and that even if the period were to be reckoned from that date the appellant was still out of time. The consideration of the appellant's plea in the court below rendered the defendent's striking-out application akin to one where evidence is allowed.

Learned counsel for the defendant argued that the plaintiffs had not put in a reply to the statement of defence to show that they had an exception to limitation to rely on. It must be remembered that it was soon after the statement of defence was filed, that is to say before the time for filing the reply had expired, that the defendant applied for striking out. I accept the submission of learned counsel for the plaintiffs that they could still file a reply, after applying for extension of time, if necessary.

As I said, I would follow the decision in the *Ronex* case. I dismiss this appeal with costs.

a

b

This page is intentionally left blank

c

d

e

f

g

h

i